No. 14,506

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT L. HALL,
Plaintiff and Appellant,

vs.

COPCO-PACIFIC, LTD., a Delaware corporation,
Defendant and Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Constitutions

Statutes

Texts

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BRIEF FOR APPELLEE.

This is a personal injury action between plaintiff employee and defendant employer; jurisdiction is based upon diversity of citizenship, plaintiff being a resident of Washington and defendant a Delaware corporation doing business in California.

Plaintiff filed his original complaint in the court below on December 10, 1953, alleging injury in Oregon on December 10, 1951. The complaint claims that he was involved in a collision while driving a vehicle belonging to the defendant employer, the collision allegedly being due to the shifting of the vehicle's load.

First Amended Complaint was filed January 12, 1954 (Tr. 3-6) and sets forth two causes of action. The first cause of action is based upon the Oregon Employers' Liability Act, Section 102-1601, Oregon Compiled Laws Annotated (now Section 654.035 et seq., Oregon Revised Statutes), it being alleged that the employment involved "risk or danger" within the meaning of that law. The second cause of action is stated to be based upon the Oregon Workmen's Compensation Act, Sections 102-1701 to 102-1785, Oregon Compiled Laws Annotated (now Oregon Revised Statutes, Section 656.001 et seq.) and is founded upon the theory that defendant is uninsured under the Oregon Workmen's Compensation Act and is therefore subject to suit on a negligence basis.

Defendant thereafter filed its answer (Tr. 6-8) and shortly thereafter moved for summary judgment under Rule 56(b) on the ground that the action is barred by the Statute of Limitations. (Tr. 8.)

The Court below granted defendant's motion and judgment was entered thereon on July 13, 1954. (Tr. 10.)

STATEMENT OF THE CASE.

(1) The original complaint in this action was filed two years to the day from the date of injury.

(2) The parties agree that under the rule of *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 82 Law. Edition 1188, 58 S. Ct. 817, a California Statute of Limitations applies to this action.

(3) The California Statute of Limitations for personal injury actions is one year (California Code of Civil Procedure, Section 340(3)); the statute for actions upon "liabilities created by statute" is three years. (California Code of Civil Procedure, Section 338(1).)

(4) Appellee contends that the State of Oregon has determined (*Shelton v. Paris,* 261 Pac. (2d) 856, 199 Ore. 365) that actions of the type here involved are not "created by statute" and that the Oregon Workmen's Compensation and Employers' Liability Acts are codifications of the common law not creating new causes of action; hence Appellee contends that this action is one for personal injuries and is barred by California Code of Civil Procedure Section 340(3).

(5) Appellant contends that California has determined (*Rideaux v. Torgrimson,* 12 Cal. (2d) 633, 86 Pac. (2d) 826 (subsequent appeal at 39 C.A. (2d) 273)) that the California Workmen's Compensation Act is one "creating liability" and is governed by the three-year statute (California Code of Civil Procedure, Section 338 (1)); that the Oregon statutes here involved should be similarly interpreted by a United States Court in California; and that hence this action is timely as brought within three years from the date liability arose.

(6) The question for this Court to decide is therefore whether a Court of the United States sitting in diversity jurisdiction in California is required to apply Oregon or California law to determine the *nature*

of the cause of action asserted, this being necessary to determine the applicable Statute of Limitations.

ARGUMENT.

(1) UNDER THE DECISIONAL LAW OF OREGON THE LIABILITY SET FORTH IN THE OREGON EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION ACTS HAS BEEN DETERMINED TO BE AN EXTENSION OF COMMON LAW LIABILITY RATHER THAN A LIABILITY CREATED BY STATUTE.

If Oregon law be applicable in the determination of whether or not the causes of action set forth in the First Amended Complaint are statutory or common law in nature, it cannot be doubted that the appropriate Statute of Limitations to apply here is the California one-year statute. (California Code of Civil Procedure, Section 340(3).) This very question has been decided by the Oregon Supreme Court in the case of *Shelton v. Paris,* 261 Pac. (2d) 856, 199 Ore. 365. Because this case is on all fours with the instant action and is of such controlling importance we set it forth here at length as follows:

> "This is an action brought by the plaintiff under the Employers' Liability Act, O.C.L.A. § 102-1601 et seq., against the defendant to recover for personal injuries suffered by the plaintiff while in the employ of the defendant. The plaintiff's complaint generally alleges that the defendant was engaged in logging operations; that he required the plaintiff to ride upon the back of a tractor in a place declared by the Industrial Accident Commission, in the interests of safety to be prohibited; and that as a result thereof on

June 28, 1948, the plaintiff was injured. The complaint was filed January 24, 1951, and the defendant demurred thereto, the principal ground therefor being that the cause of action was not brought within the two year statute of limiations: 'An action * * * for any injury to the person or right of another, not arising on contract, * * *.' § 1-206, subd. 1, O.C.L.A. Upon this ground the demurrer of the defendant was sustained by the trial court, the action was dismissed, and the plaintiff appeals.

"Plaintiff contends that the six year statute of limitations, § 1-204, subd. 2, O.C.L.A., as amended by ch. 492, Oregon Laws 1947, is applicable as the liability is one created by statute.

"(1) The sole question before us is whether or not the Employers' Liability Act, including therein the rules and regulations of the State Industrial Accident Commission, which have the force and effect of law, creates a liability by statute. The test of 'a liability created by statute' is whether or not ' "* * * independent of the statute, the law implies an obligation to do that which the statute requires to be done, and whether, independently of the statute, the right of action exists for a breach of the duty or obligation imposed by the state." Wood, Lim. Act. § 39.' State v. Baker County, 24 Or. 141, 146, 33 P. 530, 531. This definition has been generally accepted and approved by the majority of the courts of this country. 37 C.J. 783, Limitations of Actions, § 123; 53 C.J.S., Limitations of Actions, § 83; 25 Words and Phrases, 61, and Cumulative Annual Pocket Part.

"The Employers' Liability Act, § 102-1601, O.C.L.A., provides that all employers engaged in

'any work involving a risk of danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices'.

"Section 102-1228, O.C.L.A., imposes upon every employer the duty to furnish the employee a safe place of employment, together with such tools, safety devices and safeguards as shall be reasonably necessary to protect the life and safety of the employee. This section in general enjoins upon an employer the same duties that were required by the common law. Morandas v. L. R. Wattis Co., 71 Or. 367, 142 P. 537; Hoffman v. Broadway Hazelwood, 139 Or. 519, 10 P. 2d 349, 11 P. 2d 814, 83 A.L.R. 1008.

"Section 102-1601, O.C.L.A., enlarges the requirements of § 102-1228, O.C.L.A., by enjoining upon every employer of labor involving work wherein there is risk or danger to the employees the added requirement that he shall use every practicable protection for the safety of his employees regardless of the additional cost of the suitable safety appliances, material, and devices, subject only as he may be limited by the necessity for preserving the efficiency of the structure, machine, apparatus or device. *The statute increases the burden of the employer in hazardous occupations, but not the liability.* The gist of the action is the same, that is,—liability for negligence, *but no new liability is created by statute, since the liability of an employer for his negligent act*

toward an employee existed in the common law. The Employers' Liability Act substitutes, in hazardous employments, a higher degree of care than the ordinary degree of care prevailing generally in the relationship between master and servant. Coomer v. Supple Investment Co., 128 Or. 224, 274 P. 302; Mallatt v. Ostrander Ry. & Timber Co., D.C., 46 F. Supp. 250, 252.

"Employers not operating under the Workmen's Compensation Act., O.C.L.A. § 102-1701 et seq., in this state are not insurers. 'They are liable for consequences, not of danger, but of negligence * * *'; Adams v. Corvallis & E.R. Co., 78 Or. 117, 128, 152 P. 504, 508; Wychgel v. States Steamship Co., 135 Or. 475, 296 P. 863; Leavitt v. Stamp, 134 Or. 191, 293 P. 414; and if engaged in a hazardous occupation, as in this case, they are deprived of certain defenses. Parrott v. Hanson, 180 Or. 620, 175 P. 2d 169; Camenzind v. Freeland Furniture Co., 89 Or. 158, 174 P. 139. * * *

"This act provides that the commission shall have the power to require the doing by the employer of certain acts and the desisting from certain acts for the safety of his employees. Section 102-1241, O.C.L.A., provides that every order of the commission shall be admissible as evidence in any prosecution for the violation of any of its orders. Section 102-1242, O.C.L.A., provides a penalty for the violation of these orders. The statutes go no further than to permit the commission to require certain acts to be done and to provide punishment for the violation of its orders. In other words, it is permitted to establish a standard of care, which includes the requirement

that certain safety devices be used, to be followed by an employer, but it is not permitted to change his liability to the employee from that which arises out of the negligence of the employer to that of absolute liability as an insurer. The rights granted the commission merely change the measuring stick by which negligence may be determined.

"(3) Ordinarily the standard of due care from which the triers of fact may judge the negligence or non-negligence of an act is the conduct of the reasonably prudent man. Sullivan v. Mountain States Power Co., 139 Or. 282, 9 P. 2d 1038; Fox v. Royce, 194 Or. 419, 242 P. 2d 190. In instances where a legislative body has acted to declare what shall or shall not be done, the triers of fact no longer determine the negligence or non-negligence of a party by comparison with the conduct of a reasonably prudent man, but whether or not the expressed legislative will has been complied with.

"(4) If there has been a violation of the legislative will then negligence is established not by comparison, but as a matter of law. Peterson v. Standard Oil Co., 55 Or. 511, 519, 106 P. 337.

"(3) Independent of the order of the commission, and independent of the Employers' Liability Act, the law has always attached an obligation upon the employer to respond in damages to the employee for his, the employer's negligence. *No new cause of action has been created by the statute, or the rules of the State Industrial Accident Commission, but only a determination of the standard of care to be exercised by the employer toward his employee.*

"The judgment of the lower court is affirmed." (Emphasis ours.)

This case stands for the proposition that the Employers' Liability Act of Oregon is but an extension of a common law remedy and not a new liability created by statute. It follows that insofar as the complaint is based upon this Act, it is subject to California Code of Civil Procedure § 340(3)—the one year statute—and hence is barred. *Furthermore we believe it apparent that this decision is controlling upon a similar interpretation of the nature of the Oregon Workmen's Compensation Act.* Thus the Second Cause of Action in the First Amended Complaint is based upon the premise that the employee has a direct right of action against the employer because of the employer's failure to insure as required by the Oregon Workmen's Compensation Act. It will be seen that the right of action thus set forth is very much the same as the Employers' Liability Act in that in each case the employee is permitted to sue as at common law with the ordinary common law defenses being unavailable to the employer.

The significant feature of both the Employers' Liability Act and the Workmen's Compensation Act is that they do not *create* liability, but merely make certain defenses unavailable against common law rights of action. Accordingly it may be assumed that Oregon regards both its Employers' Liability and Workmen's Compensation Acts as not being statutes creating rights but as being merely codifications of common

law rules. Therefore neither of plaintiff's causes of action is governed by the California Three-Year Statute and the entire action is barred.

That this is a reasonable and proper interpretation of the Oregon laws is indicated by the fact that several other western states having similar legislation have also construed their Workmen's Compensation Acts as not being statutes "creating liability."

For example, in *Peterson v. Sorensen,* a decision of the Supreme Court of Utah, 65 Pac. 2d 12, 91 Utah 507, the Utah Workmen's Compensation Act, stating that

> "Employers who shall fail to comply with the provisions of Section 42-1-44 (relating to the requirement that employers carry insurance or qualify as self-insurers) shall not be entitled to the benefit of this title during the period of noncompliance, but shall be liable under civil action to their employees for damages . . ."

was held to create no new cause of action but to be merely a codification of existing employees' rights. Accordingly, it was held that the Utah statute of limitations governing personal injury actions was controlling rather than the Utah statute involving "liability created by statute". The Utah Court states at page 17 of 65 Pac. 2d.,

> "(4,5) It will doubtless be conceded that unless relieved by the Industrial Act, the employer remains liable for his negligent injury of his employee. There is nothing in the language of section 42-1-57, supra, or elsewhere in the act, which

expressly or by necessary implication deprives an employee of his common-law action against a noncomplying employer for injuries sustained by the former on account of the negligence of the latter. On the contrary, those provisions of the act which deprive the noncomplying defendant employer of the defenses of the fellow-servant rule, assumtion of risk, and contributory negligence, and cast upon him the burden of showing freedom from negligence, are calculated to enlarge rather than to restrict the right of the employee to recover for injuries sustained by him on account of the negligence of the employer. If, in an action by an employee against a noncomplying employer, the former assume and successfully maintain all of the burdens of a common-law action necessary to recover judgment, it is clear that the employee would be entitled to a judgment against the employer notwithstanding the provisions of the Industrial Act. That is to say, the employee is not required to rely on the Industrial Act at all as a basis for recovery against a noncomplying employer. The essence of the cause of action alleged by plaintiff is that he was injured by defendant's negligence. The mere fact that the Industrial Act contains provisions which make it less burdensome for plaintiff to establish his claim and take from defendant certain defenses does not justify the conclusion that the cause of action is one created by statute. Moreover, the noncomplying employer 'shall not be entitled to the benefit of this title during the period of noncompliance.' Section 42-1-54. By pleading the bar of the one-year statute of limitation, the defendant seeks, contrary to the express provisions of the act, to avail himself of the

act. This he may not do. We are of the opinion that this action is not barred by the one-year statute of limitation and that, therefore, the action should not be dismissed."

(Note: In Utah the statute of limitations for liabilities created by statute is one year.)

The Nevada Act has been similarly construed by Judge Foley of the United States District Court for the District of Nevada in *Gonzalez v. Pacific Fruit Express Co.,* 99 Fed. Supp. 1012. The Court states:

"It is defendant's contention that plaintiff's right of action is created by statute in the Nevada Industrial Insurance Act and therefore is within the provisions of the statute of limitations covering liabilities created by statute . . . the right of action asserted by plaintiff is not an action based upon a liability created by statute, other than a penalty or forfeiture. That portion of Section 8524, 1929 N.C.L., providing that an action upon a liability created by statute, other than a penalty or forfeiture can only be commenced within three years has no application here."

In *Beeler v. Butte, etc. Copper Development Co.,* 41 Mont. 465, 110 Pac. 528, it was held that although a cause of action against an employer for damages for personal injuries sustained by an employee as a result of the negligence of a fellow servant, did not exist prior to the passage of Section 5248 of the Montana Code, such action was not a liability created by statute within the provisions of the Code relating to limitations.

The weight of authority therefore supports Oregon's conclusion that the statutes of the type we have here involved do not create liability and that hence actions brought thereunder are not subject to the special limitations periods prescribed for liabilities created by statute.

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(2) SHELTON v. PARIS, SUPRA, IS CONTROLLING HERE BECAUSE UNDER CALIFORNIA CONFLICTS RULES, THE LAW OF THE PLACE OF THE WRONG IS APPLIED IN DETERMINING MATTERS CONCERNING THE CAUSE OF ACTION.

Appellant asserts and we agree that under *Klaxon v. Stentor El. Manufacturing Company,* 313 U.S. 487, 85 Law. Edition 1477, 61 S. Ct. 1020 federal Courts sitting in California are governed by California conflict of law rules as well as California substantive law.

We do not however agree with appellant's contention that California's conflicts rules would have required the application of forum law to the determination of the nature of the causes of action asserted here. We think that if this problem were posed to a California Court, such a Court would be guided by Oregon's interpretation of its own statute as set forth in *Shelton v. Paris,* supra.

Appellant cites *Western Coal and Mining Company v. Jones,* 27 Cal. (2d) 819, 167 Pac. (2d) 719 for the proposition that "the law of the forum governs statutes of limitation and their applicability." This was an action upon promissory notes brought more than four years after maturity of the obligations in which

the defendant asserted that the action was barred by California Code of Civil Procedure, Section 337. Plaintiff contended that the bar of the statute was avoided because of a later acknowledgment and defendant countered with the argument that in a prior action on the same notes in Arizona it had been determined that the acknowledgment was insufficient to toll the statute. The California Court pointed out that statutes of limitation in general are regarded as procedural and hence are controlled by the law of the forum and went on to determine that in California the statute would be regarded as tolled because there was sufficient acknowledgment within the meaning of California Code of Civil Procedure, Section 360.

It is significant to note that both Section 337 and Section 360 are found in Part II, Title II of the California Code of Civil Procedure under the general heading "Time of Commencing Civil Actions" and that as applied in this case may be regarded as a single statute of limitations. Nowhere in the case is there the implication that California as a general rule will disregard a valid interpretation of a statute by a Court of a sister state on the theory that the question of the determination of the nature of the foreign cause of action is "procedural".

Appellant also cites *Miller v. Lane,* 160 Cal. 90, 116 Pac. (2d) 58, an action upon a stockholder's liability, for the proposition that California will look to its own law in determining questions of the type presented here. A reading of the decision in that case shows that the basis of the Court's holding was that the

Colorado judgment could not be honored because no personal service had been obtained upon the California defendant. If cited for the proposition that California law should govern the evaluation of the Colorado cause of action, the case must be regarded as overruled by the more recent decision of the California Supreme Court in *State of Ohio ex rel. Squire v. Porter,* 21 Cal. (2d) 45, 129 P. (2d) 357.

This too was an action to enforce a stockholder's liability by the superintendent of banks of the State of Ohio. It appeared that the action was brought against the defendant stockholder more than three years after the banking corporation involved had become insolvent.

As in our case, it was agreed that the California statute of limitations, in this case Section 359 of the California Code of Civil Procedure, was applicable. This section provides that an action against a stockholder to enforce a liability created by law "must be brought within three years after . . . the liability was created." Noting that the crux of the question was when liability was created, the California court commented upon which law should determine this subsidiary question in the following language:

> "To determine when the liability was created the full faith and credit clause of the United States Constitution (Article IV, Section 1) requires recourse to the applicable constitutional provisions, statutes and decisions of Ohio (Converse v. Hamilton, 224 U.S. 234, 56 L. Ed. 749, 32 S. Ct. 415 . . .)

> "The plaintiff's citation of numerous authorities construing the National Bank Act and other acts similar to the Ohio statute is unavailing for the reason that we are here bound by the Ohio courts' interpretation of the provisions of the Constitution and statutes of that state . . .
>
> "We therefore conclude that under the law of Ohio the stockholders liability here sought to be enforced was created on the 27th day of February, 1933 and that as the action was not brought within three years after that date it is barred by Section 359 of our Code of Civil Procedure."

This case was appealed to the Supreme Court of the United States and certiorari was denied. (318 U.S. 757, 87 L. Ed. 1131, 63 S. Ct. 531.)

To the same effect is *State of Indiana v. Hoffman,* 53 C.A. (2d) 706, 128 P. (2d) 420, also a stockholder's liability case in which the California Court referred to the law of Indiana to determine the date of creation of the liability.

It is therefore submitted that California's conflicts rule in cases involving the interpretation of foreign statutes and the determination of the nature of a cause of action codified thereby is to apply the foreign law for this purpose.

The recent decisions of the California Courts in the *State of Ohio* and *State of Indiana* cases, supra, are supported by a decision of the United States Supreme Court in a similar case *Converse v. Hamilton,* 224 U.S. 234, 56 Law. Edition 749, 32 S. Ct. 415, wherein it is said:

> "Of course we must look to the (foreign states) constitution, statutes and decisions to determine the nature and extent of the liability in question . . ."

There are also other California cases of interest on the general question. Thus in *Loranger v. Nadeau,* 215 Cal. 362, 10 Pac. (2d) 63, which was an action by a guest arising out of an automobile accident in Oklahoma, a California Court applied Oklahoma law which required proof only of ordinary negligence despite a California guest law which requires proof of willful misconduct, stating:

> "It is the settled law in the United States that an action in tort is governed by the law of the jurisdiction where the tort was committed . . ."

Similarly it is said in *Osborn v. Home Life Insurance Company,* 123 Cal. 610, 56 P. 616, that a California Court will follow the decisions of the highest Court of a sister state in construing a life insurance statute of that state.

Finally in *Wallan v. Rankin,* 173 Fed. (2d) 488, it would appear that this very Court has already determined that California's conflicts rule in these situations is to look to the law of the foreign state. In that decision Judge Healy said:

> "In deciding (the applicable law) a federal court is bound to apply the conflict of law rules obtaining in the state in which the court sits . . . In California, conformably with the general rule, it is held that an action in tort is governed by the law of the jurisdiction where the tort was com-

mitted . . . We turn to Oregon law defining the substantive rights and liabilities of the parties."

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(3) TO APPLY THE LAW OF THE FORUM IN DETERMINING THE NATURE OF THE CAUSE OF ACTION HERE WOULD BE TO DENY FULL FAITH AND CREDIT TO OREGON DECISIONAL LAW.

United States Constitution Article IV, Section 1 provides:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

By virtue of this section conflicts of law in our federal system are harmonized and local law made to apply nationally, for it is because of this section that litigants such as the plaintiff in this action can require the recognition of foreign law by United States Courts sitting in California.

But the full faith and credit clause means much more than that Courts in other jurisdictions should recognize only the legislative acts of the *lex locus delicti.* Obviously a statute is but the bare framework of the law which is given life and substance through the interpretation by judicial decision. The Courts of this country have therefore universally recognized that to give the full faith and credit clause vitality requires a recognition of judicial decisions of a sister state as well as the application of its statutory law. See *Fritz v. Metropolitan Life Insurance Company,* 50 C.A. (2d) 570, 577, 123 P. (2d) 622.

Accordingly Appellee suggests that if as Appellant requests, this Court ignores the interpretive decision of the Oregon Supreme Court in *Shelton v. Paris,* supra, the full faith and credit clause has to that extent been denied application. We believe that this Court can better follow the constitutional mandate expressed in Article IV, Section 1 by giving equal application to the statutory and decisional law of the State of Oregon in this instance.

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(4) CALIFORNIA HAS NO LAW INTERPRETING THE NATURE OF THE CAUSES OF ACTION ESTABLISHED BY THE OREGON STATUTES AND THIS COURT IS SUPPLIED WITH NO STANDARD FOR THE DETERMINATION OF THE QUESTION IF IT SHOULD BELIEVE THE OREGON DECISION INAPPLICABLE.

If, as appellant suggests, forum law should be used to determine the nature of the causes of action established by the Oregon Employers' Liability and Workmen's Compensation Acts it is apparent that this Court will inevitably be placed in the paradoxical position of attempting to interpret a foreign statute although the Courts of the state in which it sits have never had the question before them.

Neither appellant nor appellee have found any case in which California Courts have attempted to define the nature of the actions created by Oregon's statutes and it seems doubtful that such authority exists. As is said in *Traglio v. Harris,* 104 Fed. (2d) 439:

> "It would be a strange situation to determine the existence and extent of the (plaintiff's) right by reference to the law of a state which did not rec-

> ognize such a right. It seems apparent that the existence and extent of such right should be determined by the law of the state which extends it."

To similar effect see the annotation to this case in 127 A.L.R. 813.

Appellant suggests that since there is no California decision interpreting the Oregon law, this Court should attempt to speculate upon what the California Courts would do with this problem by applying the rules set forth in *Rideaux v. Torgrimson,* 12 Cal. (2d) 633, 86 Pac. (2d) 826, wherein the California Court interpreted the California Workmen's Compensation law.

Appellee submits that such a procedure would not only be improper for the reasons already stated, but would be impossible because the California Workmen's Compensation Act is in no sense analogous to the Oregon Employers' Liability and Workmen's Compensation Acts.

In California, unlike Oregon, the Workmen's Compensation Act as codified in the Labor Code of California provides an *exclusive remedy* for employees injured in the course and scope of the employment. The California statutory scheme envisions the complete abolition of all common law remedies and the substitution therefor of a single comprehensive law for the treatment of industrial injuries. Cal. Labor Code §§ 3600, 3601; *Liberty Mutual Ins. Co. v. Superior Court,* 62 C.A. (2d) 601, 145 P. (2d) 344.

On the other hand Oregon has never adopted such a comprehensive statutory scheme. Common law rights of action are still available to injured employees in Oregon and common law defenses may be raised in such actions by the defending employer. The Oregon Workmen's Compensation Act is *elective* in nature, not compulsory, and applies only to certain occupations defined as "hazardous". An employer may elect to accept or reject the act by certain actions and may insure with a State monopolistic fund or with a private insurer. It is only when he fails to reject the act in the manner provided by statute that he is subject to suit under the sections set forth in plaintiff's Second Cause of Action.

The Employers' Liability Act is a completely separate statute having no relation to the Workmen's Compensation Act and again applies only to certain limited employments, those involving "risk or danger".

It will therefore be seen that Oregon has adopted only piece-meal legislation to cover the subject of industrial injuries and that in the words of *Shelton v. Paris,* supra,

> "No new cause of action has been created by the statute . . . but only a determination of the standard of care to be exercised by the employer towards his employee."

Common law and negligence remedies still apply in Oregon and so do common law defenses except where they have ben abolished by statutes such as the Employers' Liability Act and the Workmen's Compensation Act.

Appellant suggests that California's decision in *Rideaux v. Torgrimson,* supra, interpreting its own acts is controlling here; but even a superficial examination of the two statutes shows that they are quite dissimilar and that what California has decided in the *Rideaux* case has no application where the Oregon statutes are concerned.

Thus California had at one time prior to the adoption of the comprehensive workmen's compensation act, a statute known as the Roseberry Act, which was similar to Oregon's Employers' Liability Act in that it abolished certain common law defenses. (A portion of this act is now codified as California Labor Code, Sections 2800-2801.) In a second appeal in *Rideaux v. Torgrimson,* 39 C.A. (2d) 273, 102 P. 2d 1104, the plaintiff attempted to set up a cause of action based upon these Labor Code sections. The District Court of Appeal determined that insofar as this cause of action was concerned the complaint was barred by the statute of limitations, California Code of Civil Procedure Section 340(3) because the Roseberry Act (Labor Code Section 2800) establishes causes of action which are based upon tort.

The second appeal in *Rideaux v. Torgrimson,* 39 C.A. (2d) 273, 102 Pac. (2d) 1104, therefore stands for a proposition exactly opposite to that for which it is cited by appellant here.

We conclude that the *Rideaux* cases provide no guide for the application by this Court of California law to the interpretation of the Oregon statutes at least as far as an interpretation of the Oregon Work-

men's Compensation Act is concerned, and that they affirmatively support appellee's position in regard to the cause of action stated under the Oregon Employers' Liability Act.

CONCLUSION.

The appeal in this case demonstrates that appellant is seeking to have California furnish him the benefits of Oregon law as represented by its Employers' Liability and Workmen's Compensation Statutes, while at the same time he seeks to avoid the burdens of that law as represented by the interpretive decision of the Oregon Supreme Court in *Shelton v. Paris,* supra. Appellee submits that the rules of conflict of laws as they must be applied by this Court do not permit appellant to blow hot and cold in this manner; it is further submitted that if appellant's theory be correct, the result achieved would be denial of full faith and credit to Oregon and consequent denial of due process to the appellee.

Dated, San Francisco, California,
January 31, 1955.

Respectfully submitted,
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